



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Address: COMMISSIONER FOR PATENTS

P.O. Box 1450

Alexandria, Virginia 22313-1450

www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/630,875	07/30/2003	Garry E. Baltes	29595/82608	7941

7590 12/11/2009
BARNES & THORNBURG
600 One Summit Square
Fort Wayne, IN 46802

EXAMINER

CHRISS, JENNIFER A

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

12/11/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

1
2
3 UNITED STATES PATENT AND TRADEMARK OFFICE
4

5
6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8

9
10 Ex parte GARRY BALTHES, DARRELL R. EGGERS,
11 and HARRY R. HICKEY
12

13
14 Appeal 2009-007058
15 Application 10/630,875
16 Technology Center 1700
17

18
19 Oral Hearing Held: November 17, 2009
20
21

22
23 Before CATHERINE Q. TIMM, MICHAEL P. COLAIANNI, and
24 JEFFREY B. ROBERTSON, Administrative Patent Judges
25

26 ON BEHALF OF THE APPELLANT:
27

28
29 GREGORY S. COOPER, ESQUIRE
30 BARNES & THORNBURG
31 600 ONE SUMMIT SQUARE
32 FORT WAYNE, IN 46802
33
34
35
36
37
38

1 The above-entitled matter came on for hearing on Tuesday, Novem
2 17, 2009, at 9:00 a.m. at the U.S. Patent and Trademark Office, 600 Dulany
3 Street, Alexandria, Virginia, before Paula Lowery, Notary Public.

4 JUDGE TIMM: Good morning, this is Hearing Room 2.

5 MR. COOPER: Hi, my name is Greg Cooper from Barnes &
6 Thornburg.

7 JUDGE TIMM: Mr. Cooper, I assume you are here for --

8 MR. COOPER: *In re* Balthes.

9 JUDGE TIMM: That is Appeal Number 2009007350?

10 MR. COOPER: I have 007058.

11 JUDGE TIMM: That's correct, sorry. I was looking at the wrong
12 thing. Mr. Cooper, you can start when you are ready, and you have 20
13 minutes.

14 MR. COOPER: Twenty minutes, very good. Start now?

15 JUDGE TIMM: Yes.

16 MR. COOPER: Very good. There are three points that I would like
17 to review regarding this rejection of Claim 19. Since Claim 19 is only being
18 rejected under § 102 and the rest of the claims at issue are dependent, I think
19 most of this case can be disposed of just with the independent claim.

20 The first is that what is being cited against me is a convertible top for
21 an automobile. What we are claiming, and what we have in the limitations,
22 is a headliner. We have a headliner core layer.

23 Headliners are known to those skilled in the art, and we have cited
24 everything from an actual sample of the headliner, to photographs
25 comparing a headliner to an automobile convertible top, and testing

1 requirements from Toyota and Johnson Controls, as well as the Specification
2 itself.

3 What we have received in reply is either that all of this is
4 unpersuasive, or in the case of the Toyota requirements, that that was only
5 for year 2006; but we have not received any rebuttal evidence that our
6 evidence that this is the rigid body of the headliner per one skilled in the art.

7 JUDGE TIMM: The Examiner does refer to a dictionary definition on
8 page 8 of the Answer.

9 MR. COOPER: Correct, and we believe that's incorrect. I understand
10 using a dictionary, but that does not supplant what one skilled in the art
11 believes a headliner is.

12 Keep in mind, first of all, with *Phillips* -- I understand that the Patent
13 Office can take a broader view, but they still have to follow *Phillips*.
14 *Phillips*, indeed, warned us not to focus on dictionary definitions in the
15 abstract.

16 They said, specifically, that the reliance on a dictionary divorced from
17 the intrinsic evidence risks transforming the meaning of the claimed term to
18 one skilled in the art to a meaning in the abstract. That's exactly what's
19 going on here.

20 Headliner is not a piece of fabric to one skilled in the art. It's not a
21 piece of fabric sitting over your head.

22 In fact, we have in the Specification you can have a facial layer, a
23 decorative layer, which is the fabric; but the actual headliner is not that
24 fabric. The headliner is this body that's above it.

25 If you just go in your automobile tonight and you kind of poke at the
26 ceiling, of course there's fabric there, or it could be leather or some other

1 material, but that is not the headliner. If you poke it, you'll feel some
2 structure between whatever fascia cover you have and the steel roof of the
3 car.

4 Sitting between that fascia layer and the roof is the actual headliner.
5 That's in there for strength. It's in there for sound dampening. Ours is for
6 recyclability. There's a lot of reasons to put that in there, but it's not merely
7 the fabric covering.

8 That's not what we describe it to be in the spec. I mean, nowhere in
9 the Specification do we say the headliner is a piece of fabric. That's not
10 what -- as far as the evidence, that's not what we're making.

11 We have a picture of the actual headliner suspended between two chairs. I
12 think it's page 4 of the original Brief. That's compared to the convertible
13 top cited against us. They're completely different structures.

14 We are not claiming a flexible convertible top or a piece of fabric.

15 We are claiming a headliner that has a headliner core layer.

16 In fact, we called it a headliner core layer because, originally, we had a
17 paper towel cited against us. We got over that by just adding headliner so it
18 was clear in the Specification and not the preamble only.

19 Everything that we do when these cases are examined should be
20 towards one of ordinary skill in the art, not just what a dictionary definition
21 says. We have nothing to the contrary to argue against other than this
22 dictionary definition and the Examiner saying, well, just because the Toyota
23 requirements say 2006, that doesn't address other years.

24 The problem is that ignores all the other mountain of evidence,
25 including the headliner itself. I mean, we gave her a piece of headliner to
26 consider.

1 JUDGE TIMM: Well, is there a definition in the art of just what level
2 of rigidity is required for a headliner versus a similar type of composite
3 fabric?

4 MR. COOPER: In this case, the industry requirements we needed to
5 meet was 10 millimeters. There could not be a deflection of 10 millimeters.
6 Our headliner comes in at about 1.27, and depending on formulations can be
7 as low as .15 millimeters. That's a small amount, and I think the testing
8 Specifications are, I think, at 150 degrees. So you're putting environmental
9 conditions on this body.

10 Of course the reason, as you can probably imagine, is the inside of a
11 car gets very hot, and you don't want the materials in that headliner to begin
12 loosening or melting and start sagging. So that's the whole reason it's rigid.
13 Because you can't have it sagged.

14 In contrast, in the Jarrard reference with just 300 grams the
15 convertible top needs to bend at 45 degrees. Indeed, Jarrard describes this
16 convertible top as also being used for awnings.

17 So it's a completely different structure. The best place to see that is
18 just looking at the photographs on page 4 of the original Brief. We are
19 lining the inside of what would be a metal roof, and you cannot have -- just
20 common sense, you cannot have sag.

21 We say the standard is less than 10 millimeters in our Specification.
22 That's consistent with the Toyota standards. Just because we don't have
23 year 2007 and 2005 -- I mean, I don't know what changes to where Toyota
24 requires headliners to have a specific rigidity in 2006 but requires no rigidity
25 in 2005 or 2007.

1 JUDGE TIMM: I think maybe what the Examiner is trying to point
2 out is maybe that your evidence seems to be to one standard for one year
3 versus – she’s not sure this is an industry-wide standard.

4 MR. COOPER: Well, the Johnson control is not year specific. The
5 headliner we’re making for automobiles is the headliner we submitted.
6 I understand what you’re saying, but we would need something to say, well,
7 headliners only needed to be rigid in 2006, but not 2005 nor 2007; and what
8 we specifically state in our specification about the headliner is that it is rigid,
9 and it has a sag of only 1.2 something millimeters.

10 I mean, that is a rigid body. It is not the same as folding it in half at
11 300 gram centimeters.

12 JUDGE TIMM: You could add those limitations to your claim. Then
13 it would be clear that your claim is limited to those types of rigidities and
14 standards.

15 MR. COOPER: I agree, and maybe in retrospect the problem is we
16 don’t want to be pigeon-holed.

17 The Examiner does have a lot of mechanisms available to her to reject
18 claims, but I don’t think it’s proper when we’re talking apples and oranges to
19 say, well, yeah, yours is different but I’m just going to equate it to something
20 else and bring in a dictionary definition and supplant, basically, a mountain
21 of evidence with just an abstract dictionary definition. That’s exactly what
22 *Phillips* warned us not to do.

23 To say the only difference between our claimed headliner and a
24 convertible top is the specific testing requirements, that makes it -- you
25 know, the only difference. I mean, that’s a little bit difficult for us to take
26 because they’re different things. They’re just inherently different things.

1 JUDGE TIMM: We have to look in terms of the structure that's being
2 claimed in order to determine if there is a real structural difference. The
3 word headliner has to connote a positive or affirmative structural difference.

4 MR. COOPER: I agree with you, but I think we do that. I think a
5 headliner, based on the evidence we've submitted, it's clear that it is a rigid
6 body.

7 The Declaration from Mr. Balthes on August 31, 2006, had gone
8 through that. That this is a rigid headliner that sits between each window
9 post of an automobile underneath the roof of the car.

10 It inherently has to be a rigid body because that's what it's there for.
11 So that's, I think, what our fundamental problem is. We are talking about
12 apples, the Examiner brings in oranges, ignores all of our evidence, and just
13 says it is not persuasive.

14 It's hard to combat that because there's no argument to combat other
15 than she says it's a fabric. I mean, just on its face we're not a fabric.
16 I mean, we affirmatively claim a headliner core layer. I think the headliner
17 in the preamble defining the structure, I think that breathes life into the claim
18 and is required.

19 JUDGE COLAIANNI: Mr. Cooper, this is Judge Colaianni. I wanted
20 to ask you a question. I know you've been arguing that the headliner in your
21 claim is limited to a rigid structure, and you cite to the embodiment in the
22 Specification on page 11 as indicative of that where you have a "quite rigid"
23 language present on that page.

24 The Examiner further points on that page -- further down in the same
25 paragraph that you point to -- you have the disclosure here that other panel
26 headliner applications may not require such a limited deflection range.

1 That's providing some evidence that the headliner you have claimed is not
2 necessarily limited to such a tight rigidity and would be inclusive of more
3 forgiving or flexible material.

4 MR. COOPER: I understand that, and I appreciate that point. What
5 we're talking about there is it does talk about that we can go down to, I
6 think, 15 some-odd millimeters. So we're talking between 10 and 15
7 millimeters being the difference.

8 So, yes, in certain circumstances we would not be adhering slavishly
9 to the Toyota requirements, but it's a matter of 15 millimeters. We still have
10 to understand that when we talk about headliner we have provided a whole
11 host, including the headliner itself. We provided all this information of what
12 the headliner is, particularly contrasting that headliner with a flexible
13 convertible top.

14 JUDGE COLAIANNI: Let me ask you this then, if you take Jarrard's
15 disclosure of having a convertible top -- when you put that on the frame of
16 an automobile and you close the top, why would that not be a headliner and
17 top as well and serve a dual purpose?

18 MR. COOPER: Because the headliner is a term of art. Headliner is
19 not just -- like I said before, if you poke at your ceiling, the headliner is
20 actually sitting above whatever fascia, whatever decorative layer you have at
21 the bottom that matches the decor of the interior of your vehicle.
22 That is not the headliner. That's just a fascia layer. We have one of those.
23 What we have above that, and what's in your car, is a rigid body. It's a term
24 of art.

25 When somebody in the automobile industry as our evidence points
26 out -- when you have somebody in the automobile industry asking for a

1 headliner, they're not asking for a convertible top. If they're asking for a
2 convertible top, you want a convertible top.

3 This case is just on point exactly with *Phillips*' warning of just don't
4 pull dictionary definitions out of the abstract. It's easy to say, oh, the
5 dictionary says it's a piece of fabric.

6 Most people don't look up in their ceiling and kind of poke at it and
7 see what's up in there, but the patent is not designed for someone not skilled
8 in the art. The patent is drafted to one skilled in the art.

9 We don't have to put the definition of every single term. In fact,
10 we're not supposed to put the definition of every single term just to have an
11 exhaustive disclosure.

12 To answer your question, one skilled in the art, as we've shown,
13 understands what a headliner is, even if one not skilled in the art thinks of it
14 as that decorative layer sitting above your head.

15 One skilled in the art would not take -- if asked for a headliner --
16 would not pull out a convertible ragtop and say, well, here you go.

17 JUDGE TIMM: Mr. Cooper, you have two minutes to finish your
18 arguments.

19 MR. COOPER: I would also want to point out that in addition to not
20 having a headliner as claimed, or the headliner core layer, Jarrard also fails
21 to explicitly or implicitly describe the randomly oriented natural fibers
22 disbursed throughout the layer.

23 The Examiner points to a foam layer that can be laminated,
24 incorporated, or compounded; but that is not the same thing as disbursed
25 throughout the layer. Just because you put fibers on top, stick some fibers
26 inside, that's not the same.

1 The other limitation of the film layer, both the Examiner and I agree
2 that the film layer is defined as an extremely thin, continuous sheet of
3 substance that may or may not be in contact with the substance.

4 What she cites against us from Jarrard is, basically, Scotchguarding,
5 which is similar to a rejection we received a long time ago, which is how
6 this definition popped out.

7 We both agreed it was a film layer, not just a spray coating of fibers.
8 But that's now what's being cited against us.

9 So I think in the final analysis, not only do we not have a core layer,
10 but we're also missing two other limitations. The disbursed throughout the
11 layer limitation, we're missing the film layer limitation, and those have to be
12 either explicit or implicitly the exact same thing.

13 So we're, literally, missing four limitations out of the claim on a §
14 102(e) rejection.

15 JUDGE TIMM: Do you have any further questions?

16 JUDGE COLAIANNI: No, no further questions.

17 JUDGE ROBERTSON: No.

18 JUDGE TIMM: We are out of time, and thank you for giving us your
19 input today, Mr. Cooper.

20 MR. COOPER: Thank you. I appreciate your time. Have a good rest
21 of the day.

22 JUDGE TIMM: Thank you.

23 Whereupon, the proceedings at 9:21 a.m. were concluded.
24
25
26